Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Annual Assessment of the Status of	)	
Competition in the Market for the	)	MB Docket No. 04-227
Delivery of Video Programming	)	
	)	
	)	

COMMENTS OF THE CITY OF WESTON, FLORIDA

AND

THE TOWN FOUNDATION, INC.

Gary I. Resnick, Esq.
Scott Robin, Esq.
Weiss Serota Helfman Pastoriza
Guedes Cole & Boniske, P.A.
3107 Stirling Road, Suite 300
Fort Lauderdale, FL 33312
(954) 763-4242

Attorneys for the City of Weston, Florida
and The Town Foundation, Inc.

July 23, 2004

COMMENTS OF THE CITY OF WESTON, FLORIDA AND THE TOWN FOUNDATION, INC.

Introduction

These comments are filed by the City of Weston, Florida ("Weston") and by The Town Foundation, Inc. ("Foundation") in response to the Federal Communications Commission's ("FCC" or "Commission") Notice of Inquiry into the state of competition in the cable industry.[1] Specifically, these comments address the issues raised in paragraph 12 regarding the effect of so-called perpetual bulk contracts on video competition.[2] Weston has the unique distinction of having most of the City's residents, approximately 15,000 households, forced to pay for cable services as part of their homeowners' dues under a 17-year old "bulk" contract that could potentially continue forever. Residents have consistently complained about being locked in to paying for cable services they do not want and not having the same choice to obtain service from other providers as residents in surrounding communities. While the City and Foundation have attempted to negotiate a reasonable exit from this bulk contract, the cable operator insists upon strict adherence because of guaranteed and significant revenues with no threat of competition.[3] Weston and the Foundation bring their situation to the attention of the Commission and request that the Commission take action that will allow these residents a reasonable exit from this anticompetitive situation.

There are several concerns with such perpetual bulk contracts. Such perpetual cable service agreements: (1) create a barrier to entry for other cable companies and direct broadcast satellite ("DBS") providers thus preventing competition; (2) restrict consumers' choices; (3) force consumers to pay for services they may not be able to afford; and (4) allow the monopoly cable operator discretion to alter cable services and rates without fear of losing customers or revenue. Such perpetual contracts are inconsistent with the Commission's goals of advancing Congress's objectives in the Telecommunications Act of 1996 to promote competition in cable communications. Weston and the Foundation urge the Commission to declare such agreements illegal, to prohibit automatic renewals, and to impose a reasonable termination date. As an alternative, Weston and the Foundation suggest that the Commission should create a procedure other than litigation that would allow the parties to reach a fair and reasonable, binding solution.

---

[1] Weston is a Florida municipality with approximately 61,500 residents. Foundation is a not for profit Florida corporation that is the property owners' association, consisting of 14,639 single family and 368 multifamily residential homes. When Weston was first incorporated, virtually all residences were within the Foundation. Weston subsequently annexed additional areas from Broward County, FL, which are not located within the Foundation.

[2] Paragraph 12 specifically addressed this issue in the context of multiple dwelling units ("MDUs"). While the Foundation is a homeowners' association of mainly single family homes, the issues regarding perpetual bulk contracts' effect on competition are nonetheless relevant.

[3] The Foundation bills residents and pays the cable provider approximately $600,000 per month or over $7 million per year under the contract.

Historical Background

As with many perpetual cable contracts, there is frequently a long and complicated history of corporate subsidiaries, transfers, and assignments. Such transactions are relevant because they show that there is often a relationship between the developer and provider of cable services at the time that they entered into a contract and not full disclosure to residents who are then locked into such contracts. When the developer sells the cable system, the new provider attempts to acquire the system subject to perpetual contractual rights reserved by the developer.

By way of background concerning Weston, Arvida/JMB Partners, a Florida general partnership ("Developer"), purchased and developed land in the area in the early 1980's. The Developer declared such properties to be subject to certain covenants and restrictions set forth in the Foundation documents and reserved the exclusive rights to provide cable television services. In 1987, Weston Communications Corporation ("WCC") (a subsidiary of the Developer), the Foundation (which at the time was controlled by the Developer), and Developer entered into a bulk cable Service Agreement ("Agreement") whereby WCC would install a cable system and provide cable services to the Foundation's residents. The Foundation would bill all homeowners and then pay WCC. WCC transferred its rights under the Service Agreement to another subsidiary of Developer, Gulf and Pacific Communications Limited Partnership ("Gulf & Pacific"). In 1996, this area incorporated into Weston. In 1998, Weston entered into a cable franchise agreement with Gulf & Pacific that expires in 2013.

In 1998, Gulf & Pacific sold the cable system to Advocate Communications, Inc., d/b/a Advanced Cable Communications ("Advanced Cable"). Gulf & Pacific transferred its rights under the Agreement to Advanced Cable. Weston approved of the transfer of Gulf & Pacific's franchise to Advanced Cable.

Terms of the Agreement

Rates and Services: The Agreement requires every resident of the Foundation to pay for "Basic" cable services as part of the homeowners' assessments. While there was originally an established rate of $10.50 for "Basic" programming, the Agreement allows Advanced Cable to increase rates annually "to levels which are comparable with those available from other providers of Service in the area...." (Agreement, §16) In addition, there is no definition of "Basic" service in the Agreement, and in practice Advanced Cable provides extended basic cable service and basic cable service, consisting of 80 analog channels for $32.99 per month (excluding fees and taxes). Under the Agreement, Advanced Cable has the "sole discretion" to delete and to replace programming, and may add programming subject to the rate provision. (Agreement, §17) There is no opt-out provision in the Agreement to allow residents not to pay for cable services.

While Advanced Cable's rate for extended cable services may currently be somewhat lower than rates of cable providers for individual service in surrounding cities, Weston's residents do not have any choice. Further, rates in much smaller communities under private bulk contracts are often significantly lower than Advanced Cable's rates. Weston's residents cannot decide not to subscribe because they are not satisfied with the rates or service. They cannot decide to subscribe to only a Basic Service Tier because Advanced Cable does not offer that in Weston.[4] Residents cannot disconnect cable if they can no longer afford it. They cannot subscribe to DBS without still paying Advanced Cable, even if they are unhappy with Advanced Cable's services.

Perpetual Agreement: The 1987 bulk Agreement was for a period of ten (10) years, but provides for automatic renewals for successive periods of ten (10) years each unless terminated by at least 90-days prior written notice by one of the parties. The Agreement further provides that if the Foundation terminates it, the Foundation must purchase the equipment owned by Advanced Cable at its appraised value. (Agreement, §18) Accordingly, under the terms of the Agreement, if the Foundation exercises its option to terminate the Agreement, the Foundation must purchase the cable system, likely with an appraised value of tens of millions of dollars making it from a practical standpoint not viable for the Foundation to terminate the Agreement. A more complicated impediment to terminating the Agreement, however, is that the Foundation may not terminate the Agreement without the Developer's written consent. (Agreement, §18) When Gulf & Pacific sold the cable system to Advanced Cable in 1998, the Developer, Gulf & Pacific, and Advanced Cable entered into a Cable Service Rights Agreement that provides that the Developer agrees "not to consent to the termination of the Service Agreement by Foundation" for the 15-year term of the franchise.[5] Accordingly, the terms of the Agreement and the subsequent agreement that was secretly entered into between the Developer and Advanced Cable purport to make it impossible for the Foundation to terminate the bulk Agreement.

Status of Video Competition in Weston

As stated above, Advanced Cable serves all of the area that was originally incorporated as Weston under the bulk Agreement. Subsequently, Weston annexed additional areas consisting of approximately 4,000 cable subscribers served by MediaOne of Greater Florida, Inc., a subsidiary of Comcast Corporation ("Comcast"). Comcast serves nearly all other cities in Broward County.[6] Even though Comcast and Advanced Cable have city-wide franchises in Weston, they have not overbuilt each other and they do not compete. Clearly, because of Advanced Cable's bulk Agreement, it makes no economic sense for Comcast to overbuild Advanced Cable and offer competing services to Foundation residents. Several residents within the Foundation unsatisfied with Advanced Cable's service have purchased DBS service even though they must continue to pay for cable services from Advanced Cable.

---

[4] Advanced Cable also provides service in the neighboring city of Coral Springs, Florida, and offers a Basic Service Tier there consisting of 26 analog channels for $16.00 per month.

[5] It is interesting that the Foundation was not a party to the Cable Services Rights Agreement and was unaware of it. Further, in 2003, the Developer assigned its rights to the City of Weston. At no time during either the transfer of the franchise to Advanced Cable or the assignment of the Developer's rights to Weston, however, did Advanced Cable or the Developer disclose to the City this Cable Services Rights Agreement.

[6] Comcast competes with Adelphia and Bell South as well as DBS and private cable operators in other cities in Broward County.

Federal Regulation of Exclusive and Perpetual Agreements

The FCC has previously addressed the regulation of exclusive and perpetual contracts. The FCC determined that a ban on exclusive contracts for telecommunications service in commercial multiple tenant environments would foster competition in that market.[7] However, the FCC limited the ban to commercial properties because the record was insufficient to address a ban in residential properties.[8] While no party supported exclusive contracts in the commercial settings, parties did support such contracts in the residential setting.[9]

More recently, the FCC declined to ban or cap exclusive contracts for the provision of video services in MDUs.[10] With respect to perpetual contracts, the Commission acknowledged that "most commenters ... assert that perpetual contracts effectively bar alternative and/or new MVPD's entry into the MDU market and are inherently anti-competitive."[11] However, the Commission concluded that the record regarding MDUs did "not demonstrate the existence of widespread perpetual contracts nor support the need for government interference at this time."[12] Weston and the Foundation respectively submit that having 15,000 residential units, representing over 50,000 persons in one city, subject to a perpetual contract demonstrates sufficient need for government intervention. Further, while Weston may be one of the most egregious examples of an anticompetitive perpetual contract, this perpetual contract is by no means unique. They are common in the context of a developer reserving the rights to provide cable services and then entering into a perpetual contract either with a subsidiary or with a franchised cable operator.

Need for Relief From The FCC

Even assuming that somehow the Foundation could get around the Developer's agreement with Advanced Cable not to consent to terminating the Agreement until 2013, it is unreasonable to require the Foundation to purchase the cable system to terminate the Agreement. The stated purpose in the Agreement for requiring the purchase of the system was to protect the Developer's initial investment in constructing the system. If the Agreement were to end without the Foundation purchasing the system, Advanced Cable would not lose the benefit of its

---

[7] First Report and Order and Further Notice of Proposed Rulemaking, WT Docket No. 99-217, Fifth Report and Order and Memorandum Opinion and Order in CC Docket No. 96-98, and Fourth Report and Order and Memorandum Opinion and Order in CC Docket No. 88-57, 15 FCC Rcd 22983 (2000).

[8] *Id.* at 22999, paragraph 33.

[9] *Id.*

[10] First Order On Reconsideration and Second Report and Order, CS Docket 95-184, MM Docket No. 92-260, 18 FCC Rcd. 1342, 1370 (2003).

[11] *Id.* at paragraph 72.

[12] *Id.* The Commission noted that only 4.8% of large MDUs surveyed representing only 58,208 units were subject to perpetual contracts. *Id.* at paragraph 76 n.194.

investment in purchasing the system. Advanced Cable would still be able to operate its cable system and offer services pursuant to its franchise with Weston. Advanced Cable prides itself on offering cable and advanced services that Weston's residents desire.[13] While Advanced Cable would have to compete with DBS and potentially Comcast if it chose to overbuild, there is no reason why Advanced Cable could not do so effectively.

The Foundation and Weston have attempted for nearly a year to negotiate a reasonable termination of the Agreement with Advanced Cable. For example, the Foundation and Weston proposed allowing Advanced Cable an opportunity to continue to operate under the bulk Agreement for several more years, and then Advanced Cable would merely operate pursuant to its franchise. Advanced Cable has rejected all proposals to end the Agreement. If necessary, the Foundation and Weston are willing to litigate the Developer's, Gulf & Pacific's, and Advanced Cable's actions, and the parties' rights under the various contracts and franchise documents. However, the Commission has an opportunity not only to address the situation in Weston, but similar situations that must frustrate communities and consumers throughout the country.

The Commission has the ability to impose reasonable exit strategies on such bulk perpetual contracts to foster competition and to eliminate such barriers to entry. One such strategy would be to prohibit automatic renewals in perpetual bulk contracts or to impose a reasonable termination date. Perhaps the solution needs to only address perpetual contracts in the context of homeowner associations that must be served by franchised cable operators, as opposed to bulk situations involving MDUs. Another such strategy would be to create a binding procedure, short of litigation, that would establish a reasonable method to terminate such perpetual contracts. There are undoubtedly other strategies that the Commission could explore that would provide relief to consumers, foster competition, and at the same time protect cable operators' private investments.

[13] Advanced Cable offers premium services, digital services, broadband Internet service, and markets Voice Over Internet Protocol service offered by Vonage.

Conclusion

Weston and the Foundation respectively submit that allowing 15,000 residential units to be subject to a perpetual bulk cable contract is inconsistent with the Commission's mission to foster cable competition. Weston and the Foundation urge the Commission to declare residential so called perpetual agreements illegal and to impose reasonable termination provisions or to adopt appropriate procedures to terminate perpetual bulk contracts to protect consumers and foster competitive alternatives.

Respectfully submitted,

Gary I. Resnick, Esq.
Weiss Serota Helfman Pastoriza
Guedes Cole & Boniske, P.A.
3107 Stirling Road, Suite 300
Fort Lauderdale, FL 33312
(954) 763-4242

Attorneys for the City of Weston, Florida and
The Town Foundation, Inc.